No. 12124

In The United States Court of Appeals
For the Ninth Circuit

DALE MENEFEE,

Appellant,

vs.

W. R. CHAMBERLIN CO., a corporation,

Appellee.

FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT

J. DUANE VANCE,
BASSETT & GEISNESS,
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FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

The appellant, a seaman, filed a libel in personam against appellee, his employer, in the District Court for the Western District of Washington (Ap. 2) stating two causes of action: the first for compensatory damages for personal injuries alleged to be due to negligence of the appellee and the second for wages, maintenance and cure. The respondent answered (Ap. 7) admitting the ownership-operation of the vessel concerned and the employment of the libelant and denied the other allegations of the libelant's first cause of action and alleged two affirmative defenses thereto: (1) contributory negligence, and (2) that the injuries to the libelant, if any, were due to a freak wave; respondent's answer denied all material allegations of the libelant's second cause of action. The cause came regularly on for trial before the Hon-

orable John C. Bowen, District Judge of the United States District Court for the Western District of Washington, Northern Division, and upon the conclusion of said trial, the court rendered its oral opinion (Tr. 182) denying the libelant any recovery whatsoever and dismissing both causes of action and thereafter the court entered findings of fact and conclusions of law (Ap. 10) and decree (Ap. 13), accordingly.

Appellant thereafter duly prosecuted his appeal to this court.

JURISDICTION OF THE DISTRICT COURT

The jurisdiction of the District Court is granted by the provisions of Title 28 U.S.C.A., §41, which vests jurisdiction of all admiralty causes in the Federal District Court. Although the statutory provisions of the Jones Act, 46 U.S.C.A. 688, are applicable these may be enforced in an admiralty proceeding, *Baltimore SS. Co. v. Phillips*, 274 U.S. 316, 71 L. ed. 1069; *Panama Ry. v. Johnson*, 26 U.S. 375, 68 L. ed. 748; *Rogosich v. Union Dry Dock & Repair Co.*, 67 Fed. (2) 377.

JURISDICTION OF THE CIRCUIT COURT OF APPEALS

The jurisdiction of this court is granted by the provisions of Title 28 U.S.C.A., §225, which gives to the Circuit Courts of Appeal the jurisdiction of all appeals from final decrees of District Courts. This section has been in substance re-enacted in the new codification of the judicial code effective September 1, 1948, Title 28 U.S.C.A., § 1291.

STATEMENT OF THE CASE

As will be shown hereinafter, appellant has waived and now waives all matters pertaining to his second cause of action, except the right to claim the sum of $35.31, which the appellee withheld from the appellant's wages to pay for the cost of subsistence of appellant in Capetown, South Africa (Libelant's Ex. 1).

Appellant's principal concern, therefore, is with the first cause of action for compensatory damages for personal injuries suffered.

There is no material conflict in the evidence. Four witnesses: the appellant himself, Englund, Jacobsen and Mydske (also seamen aboard the vessel) testified on behalf of the appellant (Tr. 5, 68, 79, 85) and Kloppenstein, the First Mate, testified for the appellee (Tr. 98).

Appellee had three other witnesses (Tr. 140, 154, 171) whose testimony went either to the degree of injury or the circumstances surrounding the wage claims contained in appellant's second cause of action.

We will set forth first the matters pertaining to appellant's claim for compensatory damages for personal injury. The charging portion of the libel relative to this matter was contained in Paragraph II thereof (Ap. 2) wherein it was stated:

"On or about January 23, 1947, during the course of said employment, while said vessel was in the North Pacific Ocean en route from the United States to Japan, libelant and other crew members were

ordered by the Chief Mate of said ship to stow below decks a hawser that was situated on the fan tail of said ship. The reason said order was given was that said vessel was exposed to heavy seas, and unless said hawser were stowed below deck, there was danger that it would be washed over the stern and foul the propeller. At said time said hawser was on the fantail of said vessel because the officers of said vessel had carelessly and negligently failed to have said hawser stowed below deck before said vessel encountered heavy seas."

The evidence submitted by *both* parties to the action substantially bears out every word of that charge.

Appellant signed on the SS ROBERT PARROTT about the 20th day of December, 1946 (Tr. 6) as an ordinary seaman at Olympia, Washington. The vessel sailed from Olympia, Washington, for Yokohama, Japan, on or about January 1, 1947 (Tr. 100, 142).

Before sailing from Olympia, a new 8-inch hawser was put aboard the vessel (Tr. 7, 69, 86). This hawser came in a bundle about four feet across, two feet deep (Tr. 7) constituting about 250 feet of line (Tr. 80). It would take almost the entire deck gang to move it (Tr. 7, 86).

Just before sailing the crew got orders to stow all hawsers, gear and equipment for safety at sea (Tr. 8). They had stowed the four forward hawsers in the forepeak (Tr. 87) and the four aft hawsers in No. 5 hatch or the steering engine room (Tr. 9) when Chief Mate Kloppenstein came out and instructed

the men to leave this new hawser on the fantail of the vessel (Tr. 8, 9).

The reason for leaving that hawser on deck at that particular time was to give the boatswain and carpenter an opportunity to put an eye in the hawser which the boatswain was ordered to do (Tr. 123) and which he subsequently did when the vessel was about ten days out of Seattle (Tr. 70). Respondent's only witness to the facts of the accident, John S. Kloppenstein, the chief mate of the vessel, who has been going to sea off and on since the first World War (Tr. 99) and who has been a licensed officer for eight years (Tr. 99) testified as follows:

> "Question: Isn't it a fact that usually the hawser is stowed below?
>
> Answer: Stored into a locker in the steering engine room." (Tr. 126)

In connection with events about to be recited, it is important to remember that the accident took place on the 22nd or 23rd of January, 1947, some 22 or 23 days out of Seattle.

The Chief Mate Kloppenstein testified as follows (Tr. 123):

> "Question: Was this hawser made fast to anything before sailing from Seattle?
>
> Answer: The hawser, before the ship left Seattle, was still in the coil and the coil was lashed fast.
>
> Question: Afterwards, it was taken out of the coil?
>
> Answer: Taken out of the coil for the purpose of splicing an eye.

Question: You ordered the Boatswain to splice that eye?

Answer: Yes.

Question: What did you tell him to do with it after?

Answer: To put it in the deck house.

Question: He didn't put it in the deck house?

Answer: No.

Question: Where did he put it?

Answer: He put it on the rack aft where the hawser had been stowed before."

The only testimony relative to the time in which said operation was completed was that of the witness Englund who testified that the eye was put in the hawser ten days out of Seattle (Tr. 70) and that of the chief mate who did not remember exactly when except that it was before the water started washing the decks of the vessel (Tr. 126):

"Question: If the boatswain had done what you told him, this probably would not have happened?

Answer: I told him to put it in the 'midship deck house and this probably would not—

Question: have arisen? Answer: Yes.

Question: You told the boatswain to do it?

Answer: Yes, but he did not do it.

Question: When did the boatswain get the eye complete in that hawser, do you know?

Answer: I don't recall, but it was before the water started washing the decks."

The vessel started running into heavy weather shortly after leaving Seattle, estimated by the various witnesses, as follows:

(1) Libelant: two or three days out (Tr. 11).
(2) Jacobsen: seven or eight days out (Tr. 81).
(3) Mydske: five to ten days (Tr. 88).
(4) Kloppenstein: "Possibly a week out—it was moderately heavy weather—not severe—usual heavy seas." (Tr. 100-101)

The whole situation as to the weather was probably best described by the witness Englund (Tr. 70) in the following questions and answers:

> "Question: How rough was it; just describe—if you would rather do it this way, Mr. Englund, just describe the general nature of the weather from the time you left Seattle up to the time of this accident.
>
> Answer: When we got outside here on the Sound and out at sea it started to get a little rough. As we went along it just seemed to get rougher. The wind got stronger and the seas started to get bigger.
>
> Question: Do I understand you then to say that it just kept getting progressively worse as you went on?
>
> Answer: Yes."

The witness Mydske said: "Well, it stayed pretty rough all the way * * * Well, it increased quite a bit up to that day of the accident. It was increasing kind of steadily.' (Tr. 88).

The witness Kloppenstein's testimony is substantially the same (Tr. 100-101).

Such conditions are to be expected at this time of the year in that area because, as stated in "American Practical Navigator" by Bowditch, 1943, page 270:

> "Thus, in January the Icelandic and the

> Aleutian minima intensifies to a depth of about 29.50 inches while in July the minima fill up and are almost obliterated. *This characteristic is associated with the gales which are frequent and violent over the higher northern latitudes in winter time and comparatively rare in summer.*" (Emphasis supplied)

The hawser was lashed to the bulwark with manila line (Tr. 10) and every so often additional lashings were fastened thereon (Tr. 11). Some four or five days prior to the accident the ship started shipping water over the stern (Tr. 72) and as the weather was getting worse the captain and chief mate made a tour of the vessel to inspect (Tr. 104) and it was decided to take the hawser into the deck house because if it became adrift it might get into the screw and disable the vessel (Tr. 102).

The libelant was on the 8 to 12 watch and had gone off duty at noon the day of the accident. At one o'clock the chief mate and the boatswain, Joe Davis, "turned to" the 8 to 12 watch to assist the two men of the 12 to 4 watch who could be spared from their duties to attempt to take this hawser into the deck house. The men proceeded aft into the gun crew's quarters and waited for an opportunity to go out and bring the hawser in (Tr. 16). They waited until a wave came over, and receded and then went out (Tr. 16). Apparently, the first mate, the boatswain Davis, and the appellant Menefee were the first ones out (Tr. 17). Subsequent events are best described in the words of the appellant (Tr. 17):

> "Question: How long were you on deck before the wave came over?

Answer: We just got out and—I don't suppose over 7 or 8 seconds. We just got out there when a wave came right on over and knocked us all down.

Question: When the wave knocked you down, what did you strike?

Answer: I had hold of one of the lines tied to the mooring line. The wave knocked me down on the deck on my stomach, and somehow I turned around and I flew up,—when the wave went back. There were three different objects that tub. Then I came down on the deck again on my back. There were three different objects that came down on top of me. What they were I don't know."

The men all got safely back into the gun crew's quarters and the line was subsequently secured into the gun crew's quarters by the seaman Mydske (Tr. 89, 90, 91).

The appellant laid on some old ropes in the gun crew's quarters, his leg was black and blue and there were two welts across his back. He was practically unconscious (Tr. 18). At about 4:30 P.M. the crew managed to make it back to the 'midship house (Tr. 18), the appellant being carried by two other men (Tr. 18, 74, 84, 92).

Thereafter, the appellant stayed in his bunk until the ship arrived at Yokohama approximately a week later (Tr. 19) where he saw an Army doctor who told him that he had several broken arteries in his leg and back and was bleeding inside (Tr. 19).

During the middle of February, while the vessel

was between Saipan and Hong Kong, the appellant started standing his wheel watch only (Tr. 23, 24). He did no other work than stand the wheel watch (Tr. 24).

The chief mate kept the appellant on light work for the rest of the time he was on the vessel, that is to say, until he left the vessel at Yokohama on July 2, 1947 (Tr. 109) some 5 months after his injury.

Appellant arrived in the United States on August 3, 1947, and at that time his back bothered him and when he did any walking his leg swelled up and turned black and blue (Tr. 25). He got a job working on the railroad around the first of October, 1947, and worked approximately six days but had to quit because his leg swelled up and turned black and blue (Tr. 26, 27). In July of 1948 he tried to work for his brother at Livingston, Montana, on the ranch running a tractor and stacking hay but was forced to quit because the work was too heavy for his injured back (Tr. 27).

Appellant has never suffered any injury or major illness prior to this injury (Tr. 27). He is 37 years of age (Tr. 39) and his principal employment has been farming (Tr. 5). He was raised in an orphanage and got schooling equivalent to approximately the fourth grade (Tr. 5, 6). He had sailed at sea about 19 months prior to his injury (Tr. 4).

The appellant has been affected with nervousness all his life (Tr. 67) and it is clear from a study of the testimony that the shock to his nervous system

because of this experience and his injuries has been considerable.

The appellant has waived all of his second cause of action except for the sum of $35.31, and the facts pertaining thereto are relatively simple and are undisputed.

On July 2, 1947, in Capetown, South Africa, the appellant, while ashore, picked up a girl and went with her in a taxicab. The girl and the taxicab driver held him up and abandoned him (Tr. 53). As a result, he missed his vessel. The American Consul had the appellant placed in jail where he stayed for 12 days (Tr. 33) until he was repatriated by the Consul to the United States aboard the SS ROBIN GOODFELLOW as an ordinary seaman (Tr. 56). The sum of $35.31 was paid by appellee for appellant's subsistence in the jail for those 12 days and appellee deducted this sum from appellant's wages (Libelant's Ex. 1). It is this sum appellant seeks on his second cause of action. He foregoes all other claims in connection therewith.

At the conclusion of the trial the court rendered its oral decision, the pertinent portions of which are as follows:

> "The immediate cause, the proximate and sole actual cause of the accident and resulting injuries complained of by libelant was a hazard of the sea in the form of that sea wave, forced across the deck and striking this libelant. Such cause of the injury was not any negligence that was an active negligent condition produced by the act or omissions of the respondent. For those reasons the court is convinced by a preponderance of the evidence that as to the first cause of action

> for negligent injury and damages, the libelant should take nothing by such first cause of action." (Tr. 182, 183)

Relative to that portion of the second cause of action now claimed by appellant the court said:

> "And it seems to the court reasonable that the respondent should have asked this libelant to reimburse the respondent for that $35.00 and that libelant's refusal to accept the statement of account between him and the respondent should not result in any penalty to the respondent." (Tr. 184)

Thereafter the court entered its findings of fact, conclusions of law and decree, dismissing both libelant's causes of action (Tr. 10, 13).

SPECIFICATION OF ERRORS

The appellant specifies as errors the following:

(1) The court erred in finding that the injuries sustained by appellant were not due to any negligence on the part of the appellee but were due to perils and hazards of the sea.

(2) The court erred in failing to find that appellee and/or its employees other than appellant were negligent in failing to have the hawser on the fantail properly stowed and that said negligence proximately caused or contributed to appellant's injuries.

(3) The court erred in failing to find that the appellee unlawfully withheld from the appellant sums of money paid by appellee for the retention of appellant in jail at Capetown, South Africa.

(4) The court erred in dismissing appellant's first cause of action.

(5) The court erred in dismissing appellant's second cause of action.

All the above specifications are to be found in the appellant's assignment of errors at page 16 of the Apostles.

ARGUMENT

I.

There Being No Conflict in the Evidence on Material Matters the Trial Court's Decision on Negligence and Proximate Cause Is Entitled to No More Weight Than It's Ruling on Any Other Question of Law.

Mahnich v. Southern SS. Co., 321 U.S. 96, 88 L. ed. 561;

Krey v. U.S. (2CCA) 123 F.(2d) 1008, 1010;

Barbarino v. Stanhope SS. Co. (2CCA) 1945, A.M.C. 1409, 151 F.(2d) 553;

Kreste v. U.S. (2CCA) 1947 A.M.C. 581, 583, 158 F.(2d) 575;

Guerrini v. U.S. (2CCA) 1948 A.M.C. 724, 167 F.(2d) 352;

Campana Corp. v. Harrison (7CCA) 114 F.(2d) 400;

Himmel Bros. Co. v. Serrich Corp. (7CCA) 122 F.(2d) 740;

Murray v. Noblesville Milling Co. (7CCA) 131 F.(2d) 470;

Kuhn v. Princess, etc. (3CCA) 119 F.(2d) 704;

United States v. Mitchell (8CCA) 104 F. (2d) 343;

United States v. South Georgia Ry. Co. (5CCA 107 F.(2d) 3;

Westland v. Post Land Co., 115 Wash. 329.

The decisions of the Second Circuit Court of Appeals in series as presented eminently develop and explain the rule and the reasons therefor.

In the first of those cases, *Krey v. U.S.* (CCA2) 123 F.(2d) 1008, at page 1010, the court said:

> "The question, then, is solely whether or not the shower was unseaworthy. Normally this would raise only a question of fact, as to which we are accustomed to defer to the rulings below as made upon conflicting evidence. The I.L.I. No. 103, Second Circuit, 104 F.(2d) 650. But the facts here are not in dispute, and the question is therefore not whom to believe, but whether the shower as admittedly constructed was unseaworthy. It is our conclusion that it was."

In that case the judgment of the trial court that the shower was seaworthy was reversed.

In the next case, that of *Barbarino v. Stanhope SS. Co.*, 1945 AMC 1409, 151 F.(2d) 553, Judge Learned Hand discussed the subject at page 1412 of 1945 AMC, wherein he said:

> "Coming then to the merits, the question is whether the stevedore was negligent, either for not keeping the boom over the 'crutch', when the loop of the 'preventer guy' was being rigged; or for not telling Barbarino to get out of the way when the boom was to be raised. Although, as we have said, the judge made no findings on either point, he did discuss the first in his opinion and expressly ruled that, considering the delay which it would have entailed to keep the

boom over the 'crutch' and the slight chance that the boom would fall, it was not negligent to expose the workmen to the risk.

"He does not, however, appear to have passed upon the second point at all, and even if he had, his finding, like that upon the first, would not have been a 'finding of fact' which we must accept unless 'clearly erroneous.' It is true that in a jury trial the standard of care demanded in any given situation is regarded as a question of fact, and the verdict is as conclusive upon it as it is upon any other question; for a jury is deemed—rightly or wrongly—to be as well qualified to set such a standard as a judge. But when the decision is that of a judge, we distinguish between such findings and true findings of fact; and the conclusion is as freely reviewable as any 'conclusion of law', strictly so called. *The W. C. Patterson*, 1934 A.M.C. 812, 70 F.(2d) 712 (2CCA); *Ford Motor Co. v. Manhattan Lighterage Corp.*, 1938 A.M.C. 879; 97 F.(2d) 577 (2CCA); *The Ira S. Bushey, Inc.*, 1941 A.M.C. 1135, 120 F.(2d) 1010 (2CCA).

"That this is right appears when we consider that to fix any standard of care two conflicting interests must be always appraised and balanced: that of the person to be protected, and that of the person whose activity must be curtailed. It is true that the interest of the person to be protected must also be discounted by the improbability that it will be invaded, and that that involves only a question of fact; nevertheless, in the end no decision can be reached except by choosing between two human interests, one of which must be sacrificed. *Such choices are the very stuff of law, and as to them appellate courts*

have no reason to defer to the decisions of courts of first instance." (Emphasis supplied)

In the next case, *Kreste v. U.S.*, 1947 A.M.C. 581, 583, 158 Fed.(2d) 575, decision by Judge Frank, this rule was sustained: See page 583, 584, wherein it was said that a rule as to contributory negligence is a conclusion of law, not a finding of fact. In that case the trial court having found the libelant guilty of contributory negligence without entering its specific findings as to whether certain things did or did not occur, the Circuit Court remanded the case to the trial court for additional findings.

In the case of *Guerrini v. U. S.* (CCA2) 1948 A. M.C. 724, 167 Fed.(2d) 352, decision by Judge Learned Hand, the *Kreste* case was followed and the case was remanded to the trial court for additional findings.

The evidence in the case at bar being not in conflict there would appear to be no reason for remanding for further findings but the ruling of the trial court should be freely reviewable as in the *Krey* and *Barbarino* cases, *supra.*

In *Mahnich v. Southern SS. Co.*, 321 U.S. 96, 88 L. ed. 561, the Supreme Court reversed the decisions of both the Circuit Court of Appeals and the District Court below on a ruling as to seaworthiness. In determining to review the findings of seaworthiness the court said (omitting citations) at 88 L.ed. 564:

"A finding of seaworthiness is usually a finding of fact. Ordinarily we do not, in admiralty, more than in other cases review the concurrent findings of fact of two courts below. Here, how-

ever, both courts below, holding themselves bound by the Penar Del Rio, 277 U.S. 151, 72 L.ed. 827, supra, and, on the facts found, held as a matter of law that the staging was seaworthy despite its defect. That conclusion of law is reviewable here."

The Washington case of *Westland v. Post Land Company*, 115 Wash. 329, is cited for the reasoning therein contained. There the court said:

"This case does not fairly come within the settled rule of this court that we will not overturn the findings of the trial court, based upon facts, unless the same appear to us to be clearly against the preponderance of the evidence. That rule is based upon the theory that there is a conflict in the testimony, and that the trial court, having the witnesses before it, is in a better position than we to arrive at the truth. But here practically all of the facts are undisputed and it is not a question of the credibility of the witnesses or of the weight to be given their testimony. The sole question here is, what is the proper conclusion to be drawn from the practically undisputed evidence. Under these circumstances, the law imposes upon us the duty of deciding for ourselves the proper conclusion to be drawn."

In *Murray v. Noblesville Milling Co.*, 131 F.(2d) 470, the Seventh Circuit said:

"To be sure where the finding of fact is supported by evidence and is not clearly erroneous, it must be accepted by us, but the rule does not operate to entrench with like finality the inferences or conclusions drawn by the trial court from its fact findings and we are free to draw the ultimate inferences and conclusions which the find-

ings reasonably induce, and *where the evidentiary facts are not in conflict or dispute, the conclusions to be drawn therefrom are for the appellate court upon review. Kuhn v. Princess etc.*, 119 Fed.(2d) 704." (Emphasis supplied)

The Third, Fifth and Eighth Circuits are in accord.

U.S. v. Southern Georgia Ry. Co. (5CCA) 107 F.(2d) 3;

U. S. v. Mitchell (8CCA) 104 F.(2d) 343;

Kuhn v. Princess, etc. (3CAA) F.(2d) 704;

See also:

Himmel Bros. Co v. Serrich Corp. (7CCA) 122 F.(2d) 740;

Campana Corp. v. Harrison (7CCA) 114 (F.(2d) 400.

One of the fundamental principles of the common law is the principle of *stare decisis*. Under that principle it is the duty of appellate courts to asure uniformity of holdings within and amongst their subordinate tribunals. "The rule '*Stare Decisis*' has for its object the salutary effect of uniformity, certainty, and stability in the law." 14 Am. Jur., Courts §60.

Thus it is clear that in cases where facts are similar it is the duty of the appellate court to see that uniform results and holdings are reached in all subordinate tribunals under its supervision. This result could not be reached if appellate courts were to defer to the rulings of trial courts on cases where the facts are undisputed. One result might be reached in one district and another result in another district. Indeed, it is even conceivable that under such circumstances there would be a divergency of result in a

particular district without adequate recourse to the litigant to protect his right to uniform justice.

No one, of course, doubts that the visual inspection of a witness is important in determining the truth of his testimony and consequently when there is a conflict in the testimony of the different witnesses appellate courts very properly defer to the findings of the trial court. Given, however, the absence of the reason for the rule, the rule itself should be inapplicable.

Determining the facts from conflicting evidence is peculiarly a function of the trier of the facts; applying the law to a given set of facts is peculiarly a judicial function, and as Judge Learned Hand said is "the very stuff of law and as to them appellate courts have no reason to defer to the decisions of courts of the first instance". (*Barbarino v. Stanhope SS Co., Supra*).

II.

The Trial Court Erred in Not Holding That the Appellee Was Guilty of Negligence Proximately Contributing to Appellant's Injuries.

This argument is addressed to assignments of error (1), (2) and (4), which are as follows:

(1) The court erred in finding that the injuries sustained by appellant were not due to any negligence on the part of the appellee but were due to perils and hazard of the sea.

(2) The court erred in failing to find that appellee and/or its employees other than appellant were negligent in failing to have the hawser on the fantail prop-

erly stowed and that said negligence proximately caused or contributed to appellant's injuries.

(4) The court erred in dismissing appellant's first cause of action.

In order to rebut the trial courts conclusion that the sole cause of appellant's injuries was the huge wave, appellant must establish that there was negigence on the part of appellee and that such negligence proximately contributed to his injury. Appellant accepts that burden.

It is not necessary, of course, that the negligence of the appellee be the *sole* cause of the appellant's injuries to justify recovery, 45 U.S.C.A. Section 51. The Jones Act, 45 U.S.C.A. Section 688, applies to seamen the laws applicable to railway employees. That law, 45 U.S.C.A. 51, provides:

> "Every common carrier * * * shall be liable in damages to any person suffering injury * * * *resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier* * * *." (Emphasis supplied)

See also: *Miller v. U.P. Railway*, 290 U.S. 233, 78 L.ed. 285, 290 (citing inter alia *Pacific Tel. & Tel. v. Hoffman*, CCA 9, 208 Fed. 221); *Hern v. Moran Towing and Transport Co.*, 138 Fed.(2d) 900; *Rey v. Colonial Navigation Co.*, 138 Fed.(2d) 90.

The undisputed facts establishing the negligence of the appellee are these:

> (1) It is the custom to stow all hawsers, those aft being usually stowed in the steering engine room (Tr. 126).
>
> (2) The chief mate ordered the boatswain to

stow the hawser after putting in the eye and he failed to do so (Tr. 123) although there was plenty of time because the eye was put in before the water started washing the decks (Tr. 127) and the only witness who fixed the time thought it was put in ten days out of Seattle, which would be some 13 days prior to the accident (Tr. 70).

(3) The boatswain failed to obey the order to stow the hawser (Tr. 123) and the first mate who had ordered the hawser stowed obviously failed to check and see that his order was complied with although all other hawsers had been stowed at the time of sailing for the sake of safety of the vessel at sea (Tr. 7, 8).

(4) The captain and the first mate made an inspection to determine the safety of the vessel on the day of the accident (Tr. 104) and the situation that appeared to them at that time as regards the hawser was apparent at all times during the voyage.

(5) The hawser in its position on the fantail constituted a great menace to navigation in that if it became loose it would endanger fouling up the propeller and rendering the vessel completely helpless (Tr. 102).

(6) Storms of this nature are to be expected during this season in the North Pacific. From the steadiness of the storm and its constant increase, it is clear that this was a gale and not a storm of cyclonic nature.

It is said in "American Practical Navigator" by Bowditch, 1943, page 270, (Of which this court will take judicial notice, *Atlantic Transport Co. v. Rosenberg Bros. & Co.* 34 Fed.(2d) 843):

> "In either hemisphere, moreover, the pressure over the land during the winter season is decidedly above the annual average, during the summer season decidedly below it; the extreme variations occurring in the case of continental Asia, where the mean monthly pressure ranges from about 30.50 inches during January to about 29.50 inches during July. Over the northern ocean, on the other hand, conditions are reversed, the summer pressures being somewhat higher. Thus, in January the Icelandic and the Aleutian Islands minima intensify to a depth of about 29.50 inches, while in July these minima fill up and are almost obliterated. *This characteristic is associated with the gales which are frequently and violent over the higher northern latitudes in winter time and comparatively rare in summer.*" (Emphasis supplied)

Furthermore, the heavy weather began about a week out of Seattle, according to the consensus of the witnesses, and constantly increased in intensity for the next 16 days until the day of the accident. During the greater portion of that time there was no water coming over the stern of the ship and it appears that good seamanship and ordinary prudence would have required that the hawser be moved during that time.

What are the facts that establish that the negligence of appellant proximately contributed to the appellant's injuries? It is undisputed that the sole purpose of the seamen being in the position they were at the time the injury was sustained was to stow this hawser which the boatswain had been previously instructed to do. It cannot, therefore, be denied, to use the well-worn legal language, that 'but for" the negligent

failure of the boatswain to so stow the hawser and the negligent failure of the officers of the vessel to see that those orders were promptly executed, these men would not have been exposed to the hazards that resulted in the injury to the appellant. The negligence of the respondent's officers and employees, therefore, concurred with the existence of an expectable gale to cause the appellant's injuries.

A case very similar to that at bar is the *William A. McKenney*, 41 Fed.(2d) 754. In that case a ship encountered a storm as here. One of the grounds of negligence alleged was that the hatch cover on No. 3 hatch was not properly secured with the result that a storm washed the hatch cover off creating, as here, an emergency situation. The facts are described by the court at page 757, as follows:

> "About 1:15 o'clock A.M. on August 9th a heavy sea broke over the deck shifting the deck load forward and carrying away the foremast, breaking the cargo boom and at the same time the sea washed open No. 3 hatch. At 1:30 o'clock A.M. during a temporary lull all hands were called to cover this hatch and while they were at this work a heavy sea which petitioner's witnesses likened to a 'wall of water' came aboard amidships carrying away 14 of the men who had worked on the hatch."

It was there argued that the negligence in failing to secure the hatch cover, if any, could not be the proximate cause of the injury. Of this the court said at page 758:

> "The negligence consists in not exercising the requisite degree of care in driving the wedges

into the dogs holding the batten and in passing the ends of the hatch bars. The petitioners here insist that if there was negligence in this respect it was not the proximate cause of the injury; in other words, that between the cause and the disastrous result there was the intervention of an act of God or vis major which could not have been anticipated. With this contention I am unable to agree. The negligent failure created a situation which according to the petitioner's own witnesses was one of extreme emergency calling for prompt action and the 20 men who responded to the call were put into an extremely perilous situation, even under circumstances that could reasonably have been anticipated. While it may be that a wave as great as the one which swept down upon the deck of the vessel at about 1:30 o'clock A.M. could not reasonably have been anticipated yet the storm had assumed such proportions that it is reasonable to suppose that at any moment a heavy sea might break over the vessel with sufficient force to sweep the men before it. This, in my opinion, required that extraordinary precautions be taken to avoid disaster and no such precautions were taken. In my opinion a causol connection between the negligence and the ensuing loss of life has been established and the deaths of the men who were swept overboard must be attributed directly to this negligent failure of the respondent's officers to exercise that degree of reasonable care which the law requires."

A second case very similar to that at bar is *Ludwig v. U.S.*, 74 Fed. Supp. 29. In that case the court found that some barrels were insecurely lashed on the deck. A storm arose and the barrels became a menace to the

ship and seamen were sent out in that storm to further secure the drums and the libelant was injured by a sea breaking over the deck, much as in the case at bar. Because of the great similarity between that case and this one we set out in some detail the language of the court:

> "On the question of liability, it is the finding, conclusion and decision of the court that the oil drums in question were negligently stowed by respondent on the deck of this vessel in that they were improperly and unseaworthily secured by the unsuitable kind of rope that was used, and in that respondent further negligently failed to use a proper, safe, careful and seaworthy method of securely tying these drums down with steel wire rope or chains fastened to the deck or hatchcoaming in a way that would have reasonably provided against alternate slacking and tightening of the tying-down means. Thereby, if such safer means had been used, the injury sustained by libelant in this case might reasonably have been avoided. Such negligence was a proximate cause of libelant's injuries.
>
> The situation here is different from that occurring in some of the cases where there was no negligence present except that which was involved in an alleged failure to foresee the onrush of a sea wave or the force of heavy seas coming aboard. In some of those cases that was the only negligence aspect of the case. *Here we have not only heavy seas and the impact of a heavy wave coming aboard but we also have this negligent stowage condition which in proximate effect continues up until the time when the heavy seas came aboard. That negligent stowage condition never did cease to exist, and I do not believe—*

notwithstanding the testimony of at least one witness who said this was a freak wave—that an ordinary, careful navigator would have been taken unawares on a voyage in these waters from Houston to Sydney respecting the kind of wave that came onto those decks that day when the libelant was necessarily carrying out the orders of a superior in trying to reattach and overcome the continuing negligent condition that these drums had been put in by the oversight and improper stowage of the ship owner and respondent in this case.

I do not believe the wave which came onto the main deck when libelant was hurt was a freak wave. There was testimony that on one or two previous occasions a wave 20 to 23 feet high had come onto not only the main deck but the boat deck. Libelant testified that before he got hurt it had been necessary to unship the number 4 lifeboat which was about on a level with the boat deck, and to pour out of the water which had accumulated in it from heavy seas smashing into it. So it seems previously there had been some heavy seas worse than or comparable to this one. While I do not place liability upon forseeability of that heavy sea that came aboard here at the particular time when libelant was injured, yet I do not feel that the evidence as to its being an unusual and freak wave, so as to have been an act of God instead of a forseeable condition of navigation, was such as to entitle respondent to exemption from liability on that ground." (Emphasis supplied)

That case was decided by the very Judge who decided the case at bar. If there is any distinction between that case and the present one, it seems to be a

distinction without a difference. In one respect the case at bar is even a stronger case than the *Ludwig* case for in the *Ludwig* case it is apparent that the stowage in the first instance of the drums on deck was appropriate for it is common to carry all types of cargo on deck. The only negligence was in the manner of securing the drums whereas in the case at bar it is apparent that there was no necessity in having the hawser on deck at the time of the accident and it also was insufficiently secured for storm conditions. In both cases the plea of a freak wave was made but not established.

Of Course, if a storm at sea causes injury to a seamen without negligence or unseaworthiness, he cannot recover, but it has always been held that where the negligence of the officers or other seamen concurs with a storm or contributes to the injury of a crew member, the mere existence of the storm does not excuse the shipowner from liability.

In *Brislin v. U.S.*, 165 Fed. (2d) 296, (4th CCA) a seaman was injured when a radio fell on his head in a storm. The court found that the set screws holding the radio up either were defective or there was a negligent failure to tighten same. The trial court dismissed the libel on the ground that the storm was the sole cause of the libelant's injuries and the Fourth Circuit Court of Appeals reversed.

In *Carroll v. U.S.* 133 Fed.(2d) 690 (2CCA) when a ship encountered a storm the cook took a coffee pot off the stove and set it on the floor of the galley. As a steward entered the galley, the coffee pot slid over,

struck his foot, tipped over and burned him severely and recovery was allowed for his injuries.

In *US.. et al v. Boykin*, 49 Fed(2d) 762, the 5th Circuit Court of Appeals affirmed recovery of a seamen who was injured during a storm while placing plugs in ventilators which should have been put in before going to sea. In that case the court referred to the wave as a "tidal wave".

So also in this court in *Atlantic Transport Co v. Rosenberg Bros. & Co.*, 34 Fed.(2d) 843, there was a very small opening around a beam between the chain locker and the cargo hold. The vessel encountered a terrific storm and the water poured up the chain spouts into the chain locker and through this very minor opening into the cargo and damaged the cargo. On very conflicting evidence as to whether such could ever have been anticipated, this court held that the ship was unseaworthy and such unseaworthiness was the proximate cause of the damage to the cargo.

In *The Cricket*, 71 Fed.(2d) 61, this court held and, rightly, that where a personal injury claim is based upon unseaworthiness and consequently there is no liability for the negligence of fellow servants, and where the ship was in a harbor where storms and heavy seas are not to be expected and where the first wave coming on deck injured the libelant the sole cause of the injury was that heavy sea and there could be no recovery. But later in the case of *Matson Navigation Co. v. Hanson*, 132 Fed.(2d) 487, this court held that where the negligence of the ship owner concurs with the existence of a storm in causing injury the seaman is entitled to recover.

No justification was contended for nor offered by appellee for not having stowed the hawser prior to the time the sea started breaking over the deck. No explanation was given as to why the orders of the First Mate were not executed nor *why he did not see to it that they were executed.*

Appellant submits that the allegations of his libel were amply sustained upon the uncontroverted facts and that the conclusion of the learned trial judge upon those undisputed facts is manifestly incorrect.

III.

Damages

There are some major facts relative to appellant's injuries which were attested to by the witnesses for both parties. The appellant was severely injured at the time and all agree that he was violently thrown about by the wave. His leg immediately swelled up and he was in a dazed condition. Some three hours after, he stayed in bed for some 32 days taking pills the gun crew's quarters to the midships house. Thereafter, he stayed in bed for some 32 days taking pills and having hot packs put on his leg. It is agreed by the witnesses that thereafter he did light work until he left the vessel in July, 1947, some 5 months after the injury.

The only evidence of his condition thereafter is the evidence of the appellant himself who testified that he did light work on the return trip to the United States on the ROBIN GOODFELLOW; that he made two efforts subsequently to work, once in October of 1947, on the railroad and once in July of 1948, when

he attempted to work on the farm of his brother. Both times he was unable to do the heavy work required due to his injury. His testimony was that his back bothered him and that a lengthy period working on his feet caused his leg to swell. This evidence was not corroborated, nor, on the other hand, was it refuted or questioned.

The appellee elicited upon cross-examination from appellant that he has had a long history of nervousness. The extreme circumstances under which the appellant was injured and the nature of his injury are such that there is no doubt that by reason of the existence of his nervous instability the injury has caused him greatly increased suffering and has been pernicious and malignant.

The evidence further is that the libelant has only a fourth grade education and has had no experience or training in any form of light work, nor has he the ability or the education to acquire necessary skill for such work.

In *Walsh's case*, 63 Fed. Supp. 421, 1945 A.M.C., 747, 152 Fed.(2d) 46, 1945 A.M.C. 1513, the libelant was the same age as libelant in this case, that is to say 36 years. He fell injuring his back which the court found left him with a 20% disability due to the fact that he was unable to perform heavy labor. The trial court allowed him $10,000.00 for the loss of future earnings, $1300.00 for pain and suffering and $1700.00 for medical expenses or a total of $13,000.00. On appeal in a decision by Judge Learned Hand, the court raised the award for pain and suffering to $4000.00 saying at page 1517:

"Probably the damaged condition of Walsh's spine was in part congenital; but there can be no doubt that, however little the fall might have injured the spine of a normal man, it injured Walsh enough to subject him to a long and severe ordeal, and, in accordance with the general doctrine, the respondent must completely indemnify him, regardless of his idiosyncracy. The Jefferson Myers, 45 Fed.(2) 162; Pieczonka v. Coleman Company, 89 Fed(2d) 353, 357; Oliver v. Yellow Cab Co., 98 Fed.(2d) 192."

Appellant's history has been one of continuous employment at heavy labor throughout his lifetime but after the injury a history of inability to do heavy labor until the time of trial, some 19 or 20 months after the accident.

The appellant was completely incapacitated from the time of his arrival in the United States in August, 1947, until the time of trial, August, 1948. Appellant's base pay is shown in Libelant's Exhibit I, but that, of course, does not reflect the true average earnings, as appellant's disability prevented him from earning the overtime which is customary at sea. Appellant's lost past earnings would appear reasonably to be $3000.00 or $3500.00. That coupled with appellant's pain and suffering, on which subject there is no need to belabor this court, and his inability to perform heavy labor at the time of trial and for an indefinite future time would seem to justify an award in the approximate amount of libelant's demand.

IV.

The Trial Court Erred in Holding That the Appellant Was Not Entitled to the Sum of $35.31 Unlawfully Withheld From Appellant's Wages to Recompense the Appellee for Monies Paid By the Appellee for Appellant's Subsistence in Capetown, South Africa.

This argument is addressed to assignments of error (3) and (5), which are as follows:

(3) The court erred in failing to find that the appellee unlawfully withheld from the appellant sums of money paid by appellee for the retention of appellant in jail at Capetown, South Africa.

(5) The court erred in dismissing appellant's second cause of action.

At Capetown the appellant was incarcerated in the local jail by the American Consul pending his shipment back to the United States on the SS ROBIN GOODFELLOW (Tr. 33, 56). The respondent, appellee here, apparently paid subsistence for this period for it charged it against appellant in its final wage accounting (Libelant's Ex. 1).

This is clearly unauthorized under the statutes pertaining thereto.

Title 46 U.S.C.A. Section 678, 34 Stat. 100, reads as follows:

> "It shall be the duty of the consuls and vice consuls, from time to time, to provide for the seamen of the United States, who may be found destitute within their districts, respectively, sufficient subsistence and passages to some port in the United States, in the most reasonable manner, *at the expense of the United States*, subject to

such instructions as the Secretary of State shall give. The seamen shall, if able, be bound to do duty on board the vessels in which they may be transported, according to their several abilities." (Italics supplied)

A companion statute, 46 U.S.C.A. 679, 46 Stat. 261, requires masters of American vessels to accept such seamen for transportation to the United States and provides for payment by the government.

The ship owner had the right to declare a forfeiture from the appellant for neglecting to rejoin his vesel by deducting "from his wages not more than two days pay or sufficient to defray any expenses which shall have been properly incurred in hiring a substitute," 46 U.S.C.A. Section 701 (second), 53 Stat. 1147. The ship owner did not choose to make claim for such expenses but that does not give it a right to claim some other penalty at its election, there being no statutory authority or rule or precedent therefor.

Exemplifying the duty of a government to provide subsistence and transportation to destitute seamen rather than any duty of the employer therefor is the case of *Alaska Steamship Co. v. U. S.*, 521 S. Ct. 159, 290 U.S. 256, 78 L. ed. 302. In that case a certain vessel of the Alaska Steamship Company was shipwrecked in Alaska and the crew thereof was returned to the United States by another vessel belonging to the same company. The Alaska Steamship Company sued the United States for compensation for such transportation under the provisions of Title 46 U.S.C.A. Section 679, and the Supreme Court held that they were entitled to recover. This holding

would seem to foreclose any duty on the part of appellee here to pay for the subsistence of the appellant while incarcerated at Capetown.

The ancient case law indicates that such was the rule prior to the enactment of this statute. In the case of *Magee et al. v. The Moss* (Gilp. 219) Fed Cas. 8944, it was said:

> "There is a subordinate question in this case which must also be disposed of. The respondent claims a credit for certain prison fees paid at Havana for the libellants, or some of them. It appears that, except in the case of Ware, the men were imprisoned by, or at the instance of the captain; but Ware was put in gaol by the police officers of the city, for some misconduct or offense against the laws of the country. For the money paid by the captain to obtain his liberty from imprisonment he is justly chargeable, and the respondent must be credited with the amount. But no such credit will be allowed against the men imprisoned by the captain for his grievances or complaint. I have declared that I will not countenance the practice of thrusting our seamen into foreign gaols by the captain, through the influence he may have with our consuls or the officers in a foreign port. It is always a most severe punishment, and in some climates dangerous to health and life. The punishments which the law authorizes the master to inflict on board of his vessel, by personal correction, by confinement and other privations, are generally sufficient for all purposes of discipline. It should be only in a case of some pressing necessity, of some danger to the vessel, or her master or crew, that the men should be imprisoned on shore."

Likewise, in *The David Pratt*, 1 Ware (495) 509, Fed. Cas. 3597, it was said:

> "If a master imprisons his seamen in a foreign gaol, he always does it at the risk of being called upon to answer for it on his return home. His right to punish his men in that way, except in cases of aggravated misconduct and insubordination, is, to say the least, questionable, and if he does resort to it, he is never permitted to charge the expenses upon the men, nor deduct their wages during the time of the imprisonment."

It, therefore, seems clearly established that in the absence of proof by appellee of any liability on its part to pay said sums, and the absence of proof by appellee of any expenses incurred in hiring a substitute for the appellant giving it a right to recover under the provisions of 46 U.S.C.A. 701, the appellee clearly had no right to deduct this sum from appellant's pay. The trial court's statement that it seemed "reasonable that the respondent should have asked this libelant to reimburse the respondent for that $35.00 * * *" seems insufficient in view of the statutory obligation expressly placed upon the government rather than appellee.

CONCLUSION

Appellant respectfully submits that the trial court erred in holding that the sole proximate cause of the accident and resulting injuries complained of by appellant was a hazard of the sea and in holding that appellant was not entitled to recover the sum of $35.31 deducted from his pay for the cost of his subsistence in South Africa and in dismissing both ap-

pellant's causes of action and that the judgment should be accordingly reversed, and that this court should enter its judgment in favor of the appellant and determine and award to him his damages accordingly.

Respectfully submitted,

J. Duane Vance
Bassett & Geisness,
Proctors for Appellant